

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

TRUE HEALTH CHIROPRACTIC,

No. C-13-02219-JST (DMR)

Plaintiff(s),

**ORDER RE: JOINT DISCOVERY  
LETTER [DOCKET NO. 133]**

v.

MCKESSON CORPORATION,

Defendant(s).

This putative class action brought under the Telephone Consumer Protection Act of 1991, as amended by the Junk Fax Prevention Act of 2005, 47 U.S.C. § 227 (“TCPA”), challenges Defendants’ alleged practice of sending unsolicited facsimile advertisements, or so-called “junk faxes.” On November 13, 2014, the court held a hearing on the parties’ three previous disputes (Docket Nos. 79, 110, 111) and issued an order the following day compelling Defendants to produce discovery after meeting and conferring with Plaintiffs to narrow the scope of discovery. *See* November 14 Order [Docket No. 27].

The parties have filed another joint discovery letter. [Docket No. 133.] The parties met and conferred as required by the court’s November 14 Order, but were unable to agree upon a narrower scope for the discovery requested. These remaining follow-up disputes are suitable for determination without oral argument. Civil L.R. 7-1(b). The disputes are addressed below.

**I. DOCKET NO. 79**

1 In Docket No. 79, Plaintiffs moved to compel Defendants to produce exemplars of all fax  
2 advertisements that did not include an opt-out notice that Defendants sent during the class period. In  
3 the November 14 Order, the court granted Plaintiffs' motion to compel and ordered Defendants to  
4 produce "all unique fax ads without opt-out notices sent by Defendants during the class period."<sup>1</sup>  
5 However, the court noted that "the discovery request propounded by Plaintiffs is too broadly  
6 worded, and could capture documents well beyond the 'fax advertisements without opt-out notices'  
7 that are the subject of this case." The court therefore ordered the parties to "have a detailed and  
8 specific meet and confer session so that they can identify the types of documents that fall within the  
9 scope of this case, and those that are outside that scope." November 14 Order at 2.

10 The parties met and conferred, but were unable to agree upon a narrower scope for this  
11 discovery. Plaintiffs have proposed that Defendants produce exemplar faxes that fall within the  
12 following description:

13 Any document that was: (1) created, in whole or in part, by one or more employees of the  
14 marketing department of McKesson corporation, McKesson Technologies, Inc., McKesson  
15 Provider Technologies, or other McKesson entity; (2) transmitted to one or more fax  
16 numbers via server, computer, or other automated function; (3) that advertised the  
17 commercial availability or quality of any property, good, or service or McKesson; (4) after  
18 June 20, 2009.

19 Plaintiffs note that even though the court sought to restrict the discovery sought to "all unique fax  
20 ads without opt-out notices," it is not functionally feasible to limit the production to faxes "without  
21 opt-out notices" because the determination of whether a particular opt-out notice complies with the  
22 requirements of the TCPA is fact-specific and likely to be contentious. Accordingly, Plaintiffs  
23 propose other limitations that will narrow the scope of discovery without opening the door to word-

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24 <sup>1</sup> The court also stated as follows:

25 [T]he presiding judge in this matter, the Honorable Jon S. Tigar, has not ruled on whether  
26 discovery should be bifurcated between class certification and merits discovery. As this court  
27 noted at the hearing, the line between "class certification discovery" on the one hand, and "pure  
28 merits" discovery on the other, can be difficult to discern. In any event, the requested discovery  
is relevant to the class certification issue, specifically to the issues of typicality and  
commonality.

November 14 Order at 2. Since then, Judge Tigar has explicitly ruled that "[d]iscovery will not be  
bifurcated without an affirmative order by the Court." See December 3, 2014 Minute Order [Docket  
No. 141].

mincing disputes;<sup>2</sup> specifically, by restricting the discovery to faxes created by McKesson's marketing department and sent via automated functions, Plaintiffs' proposed request will "likely eliminate routine business facsimiles that would likely fall outside the purview of the Junk Fax Prevention Act" and "will narrow the documents produced to those transmitted . . . only to large blocks of recipients." Docket No. 133 at 2.

Defendants' counterproposal is "to search for faxes similar to those attached to the complaint to see if there may be other exemplars." Docket No. 133 at 5. This is too narrow and unilateral to reliably generate the universe of documents that the court has already ordered.

The court finds that Plaintiffs' proposal is reasonable in that it describes the relevant documents while also incorporating measures likely to reduce burden and weed out non-responsive documents. Accordingly, by **December 12, 2014**, Defendants must produce exemplar documents meeting the definition in Plaintiffs' proposal.

## II. DOCKET NO. 110

In Docket No. 110, Plaintiffs moved to compel documents showing that the recipients of fax advertisements sent by Defendants had given Defendants prior express permission to send those faxes (i.e., documents relevant to the "permission defense"). The court granted Plaintiffs' motion to compel, stating that the "evidence sheds light on the question of whether the permission defense is an individualized inquiry or a generalized argument." November 14 Order at 2-3. However, the court also expressed its "concern that Plaintiffs' request as currently written will be burdensome." *Id.* at 3. The court thus ordered the parties to "meet and confer regarding a more efficient way for Plaintiffs to discover information about Defendants' permission defense. For example, if Defendants contend that a customer's software registration constitutes that customer's express permission to receive fax ads, Defendants could produce an example of one customer's software registration, and explain in an interrogatory response which recipients allegedly granted Defendants permission to send fax ads by completing similar software registrations." *Id.*

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<sup>2</sup> Even though Defendants are ordered to produce the responsive transmissions, they of course preserve the opportunity to argue that those transmissions were TCPA-compliant with respect to opt-out requirements.

1 The parties met and conferred and Defendants agreed to produce “a supplemental  
2 interrogatory response that details the categories of permission . . . [and] identify the evidentiary  
3 categories that would frame discovery.” Docket No. 133 at 6. However, the parties disagree as to  
4 one aspect of this discovery request: Plaintiffs want Defendants to identify the recipients that  
5 allegedly fall into each category of permission, but Defendants proposes to list the *number* of  
6 recipients that fall into each category with no individually identifying information.

7 Plaintiffs contend that the identities of the recipients are important because Plaintiffs cannot  
8 test the claim that an individual recipient provided permission to McKesson without being able to  
9 contact the individual recipients. Defendants respond that giving Plaintiffs’ the names of the  
10 recipients may result in Plaintiffs “interview[ing] every person to see if they provided consent” to  
11 receive the faxes, which “is precisely the type of individual inquiry that defeats class certification.”  
12 Defendants also contend for the first time that Plaintiffs’ contact with the recipients could cause  
13 disruption in Defendants’ relationships with the recipients, at least some of whom are Defendants’  
14 customers.

15 The court has already ordered Defendants to identify the recipients, and has already found  
16 that the protective order is sufficient to safeguard Defendants’ proprietary interests. Accordingly,  
17 Defendants shall respond to the discovery request at issue in Docket No. 110, including by  
18 identifying the names and fax numbers of the recipients, by **December 12, 2014**. To the extent  
19 Defendants now argue that Plaintiffs’ contacts with the recipients should be regulated in some way,  
20 Defendants have not adequately met and conferred on this newly raised dispute. The court will  
21 decide that dispute if and when it is properly queued up by the parties.

### 22 III. DOCKET NO. 111

23 In Docket No. 111, Plaintiffs moved to compel the production of documents containing  
24 information about recipients of the fax ads sent by Defendants during the class period, including  
25 their identities and fax numbers, and the dates and times they received transmissions. The court  
26 found “this information to be relevant to class certification issues, and further finds that Defendants’  
27 concerns about the recipients’ confidential information are adequately addressed by the parties’  
28 protective order” and therefore granted Plaintiffs’ motion to compel. Furthermore, the court held

1 that “[t]he universe of recipients shall be bounded by the group of ‘fax advertisements’ identified . . .  
2 [for] Docket No. 79.” The court’s above ruling resolves the issues in Docket No. 79. Thus, by  
3 **December 12, 2014**, Defendants must produce documents responsive to the discovery request at  
4 issue in Docket No. 111.

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8 IT IS SO ORDERED.

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10 Dated: December 5, 2014

